

05 11277 DPW

AO 241 (Rev. 5/85)

PETITION UNDER 28 USC § 2254 FOR WRIT OF  
HABEAS CORPUS BY A PERSON IN STATE CUSTODY

<b>United States District Court</b>		District Massachusetts
Name <u>Ezequiel Arroyo</u>	Prisoner No. <u>W69977</u>	Case No. <u>65094</u>
Place of Confinement  <u>Old Colony Correctional Center</u> <u>1 Administration Road, Bridgewater, MA 02324</u>		
Name of Petitioner (include name under which convicted)  <u>Ezequiel Arroyo</u>	Name of Respondent (authorized person having custody of petitioner)  <u>Bernard Brady,</u> <u>V. Superintendent</u>	
The Attorney General of the State of:  <u>Massachusetts</u>		

**PETITION**

1. Name and location of court which entered the judgment of conviction under attack \_\_\_\_\_

Suffolk Superior Court, 3 Pemberton Square, Boston, MA 021082. Date of judgment of conviction January 22, 20023. Length of sentence life without parole; 8-to-10 year concurrent  
sentence4. Nature of offense involved (all counts) first degree murder of one Luis Rivera;  
assault and battery of one Marie LaBranche

5. What was your plea? (Check one)

(a) Not guilty

(b) Guilty

(c) Nolo contendere

If you entered a guilty plea to one count or indictment, and a not guilty plea to another count or indictment, give details:

6. If you pleaded not guilty, what kind of trial did you have? (Check one)

(a) Jury

(b) Judge only

7. Did you testify at the trial?

Yes  No 

8. Did you appeal from the judgment of conviction?

Yes  No 

RECEIPT # 65094  
 AMOUNT \$ 5.00  
 SUMMONS ISSUED NA  
 LOCAL RULE 4.1 1  
 WAIVER FORM 1  
 MCF ISSUED 1  
 BY DPTY. CLK. M.P.  
 DATE 6/16/2005

INVESTIGATE JUDGE TJA

9. If you did appeal, answer the following:

(a) Name of court Supreme Judicial Court

(b) Result conviction affirmed

(c) Date of result and citation, if known June 25, 2004 SJC #08991

1) insufficient evidence; 2) improper prosecutor's

(d) Grounds raised summation; 3) illegal seizure of blood sample; 4) indictment unsupported by evidence; 5) improper admission of evidence, to wit: jacket and DNA evidence; 6) faulty instruction

(e) If you sought further review of the decision on appeal by a higher state court, please answer the following:

(1) Name of court Supreme Judicial Court

(2) Result petition for rehearing denied

(3) Date of result and citation, if known July 21, 2004

(4) Grounds raised \_\_\_\_\_

(f) If you filed a petition for certiorari in the United States Supreme Court, please answer the following with respect to each direct appeal:

(1) Name of court n/a

(2) Result \_\_\_\_\_

(3) Date of result and citation, if known \_\_\_\_\_

(4) Grounds raised \_\_\_\_\_

10. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications, or motions with respect to this judgment in any court, state or federal?

Yes  No

11. If your answer to 10 was "yes," give the following information:

(a) (1) Name of court n/a

(2) Nature of proceeding \_\_\_\_\_

(3) Grounds raised \_\_\_\_\_

(4) Did you receive an evidentiary hearing on your petition, application or motion?  
 Yes  No

(5) Result \_\_\_\_\_

(6) Date of result \_\_\_\_\_

(b) As to any second petition, application or motion give the same information: n/a

(1) Name of court \_\_\_\_\_

(2) Nature of proceeding \_\_\_\_\_

(3) Grounds raised \_\_\_\_\_

(4) Did you receive an evidentiary hearing on your petition, application or motion?

Yes  No

(5) Result \_\_\_\_\_

(6) Date of result \_\_\_\_\_

(c) Did you appeal to the highest state court having jurisdiction the result of action taken on any petition, application or motion?

(1) First petition, etc. Yes  No

(2) Second petition, etc. Yes  No

(d) If you did *not* appeal from the adverse action on any petition, application or motion, explain briefly why you did not:

\_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_

12. State *concisely* every ground on which you claim that you are being held unlawfully. Summarize *briefly* the *facts* supporting each ground. If necessary, you may attach pages stating additional grounds and *facts* supporting same.

CAUTION: In order to proceed in the federal court, you must ordinarily first exhaust your available state court remedies as to each ground on which you request action by the federal court. If you fail to set forth all grounds in this petition, you may be barred from presenting additional grounds at a later date.

For your information, the following is a list of the most frequently raised grounds for relief in habeas corpus proceedings. Each statement preceded by a letter constitutes a separate ground for possible relief. You may raise any grounds which you may have other than those listed if you have exhausted your state court remedies with respect to them. However, *you should raise in this petition all available grounds* (relating to this conviction) on which you base your allegations that you are being held in custody unlawfully.

Do not check any of these listed grounds. If you select one or more of these grounds for relief, you must allege facts. The petition will be returned to you if you merely check (a) through (j) or any one of these grounds.

- (a) Conviction obtained by plea of guilty which was unlawfully induced or not made voluntarily with understanding of the nature of the charge and the consequences of the plea.
- (b) Conviction obtained by use of coerced confession.
- (c) Conviction obtained by use of evidence gained pursuant to an unconstitutional search and seizure.
- (d) Conviction obtained by use of evidence obtained pursuant to an unlawful arrest.
- (e) Conviction obtained by a violation of the privilege against self-incrimination.
- (f) Conviction obtained by the unconstitutional failure of the prosecution to disclose to the defendant evidence favorable to the defendant.
- (g) Conviction obtained by a violation of the protection against double jeopardy.
- (h) Conviction obtained by action of a grand or petit jury which was unconstitutionally selected and impaneled.
- (i) Denial of effective assistance of counsel.
- (j) Denial of right of appeal.

*See accompanying Memorandum as well.*

A. Ground one: The evidence was legally insufficient to support conviction. There were no witnesses identifying Petitioner as the assailant, nor was there any forensic such as fingerprint or blood evidence establishing Petitioner's guilt. At most, a green jacket with blood allegedly matching the DNA profile of Petitioner was recovered a substantial distance from the crime scene, a jacket which was not sufficiently tied to the crime scene. Thus, the conviction is unreliable and violates due process.

B. Ground two: The conviction was obtained by use of evidence gained pursuant to an unconstitutional seizure of a blood sample.

Supporting FACTS (state briefly without citing cases or law):

The prosecutor's proffer of evidence was insufficient to establish a basis for seizure of the defendant's blood.

C. Ground three: The prosecutor's summation was improper and not founded upon the evidence, thereby violating due process.

Supporting FACTS (state *briefly* without citing cases or law):

The prosecutor improperly argued demographic evidence in connection with the defendant's blood profile and that found on the green jacket, even though no demographic evidence was introduced at trial; the prosecutor also argued that the murder weapon was a 9mm handgun, even though no

D. Ground four a 9mm handgun, and thus, this was prejudicial.

The trial court admitted unreliable DNA evidence in violation of due process.

Supporting FACTS (state *briefly* without citing cases or law):

The trial court failed to conduct a preliminary hearing concerning the reliability of PCR-based DNA testing conducted on a blood sample taken from the green jacket.

The reliability of the DNA evidence, and that of the Commonwealth's expert, was not established.

13. If any of the grounds listed in 12A, B, C, and D were not previously presented in any other court, state or federal, state *briefly* what grounds were not so presented, and give your reasons for not presenting them:

All grounds presented with citation to federal case authority.

14. Do you have any petition or appeal now pending in any court, either state or federal, as to the judgment under attack? Yes  No

15. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment attacked herein:

(a) At preliminary hearing George Murphy

149 Cambridge St., Cambridge, MA 02141

(b) At arraignment and plea (same)

(c) At trial George Murphy

(d) At sentencing George Murphy

(e) On appeal Donald A. Harwood, Esq. BBO# 225110

305 Broadway, 7th Floor, New York, NY 10007

(f) In any post-conviction proceeding n/a

(g) On appeal from any adverse ruling in a post-conviction proceeding \_\_\_\_\_

16. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and the same time?

Yes  No

17. Do you have any future sentence to serve after you complete the sentence imposed by the judgment under attack?

Yes  No

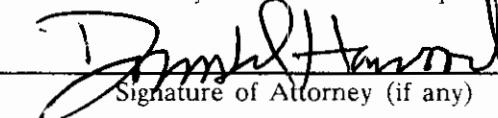
(a) If so, give name and location of court which imposed sentence to be served in the future: \_\_\_\_\_

(b) Give date and length of the above sentence: \_\_\_\_\_

(c) Have you filed, or do you contemplate filing, any petition attacking the judgment which imposed the sentence to be served in the future?

Yes  No

Wherefore, petitioner prays that the Court grant petitioner relief to which he may be entitled in this proceeding.

  
Signature of Attorney (if any)

BBO# 225110

I declare under penalty of perjury that the foregoing is true and correct. Executed on

6-10-05

(date)

  
Signature of Petitioner

## CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON THE REVERSE OF THE FORM.)

## I. (a) PLAINTIFFS

EZEQUIEL ARROYO, Petitioner

(b) County of Residence of First Listed Plaintiff Plymouth, MA  
(EXCEPT IN U.S. PLAINTIFF CASES)(c) Attorney's (Firm Name, Address, and Telephone Number)  
Donald A. Harwood  
305 Broadway, NY NY 10007 (212) 822-1400

## DEFENDANTS

BERNARD BRADY, AS HE IS/11277  
SUPERINTENDENT OLD COLONYCounty of Residence of First Listed Defendant  
CORRECTIONAL CENTER Plymouth,  
MAIN U.S. PLAINTIFF CASES ONLY  
Respondent  
RE: LAND CONDEMNATION CASES. USE THE LOCATION OF THE  
LAND INVOLVED.

Attorneys (If Known)

## II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

1 U.S. Government Plaintiff  3 Federal Question (U.S. Government Not a Party)

2 U.S. Government Defendant  4 Diversity  
(Indicate Citizenship of Parties in Item III)

State Habeas Corpus Petition

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)  
(For Diversity Cases Only)

	PTF	DEF		PTF	DEF
Citizen of This State	<input type="checkbox"/> 1	<input type="checkbox"/> 1	Incorporated or Principal Place of Business In This State	<input type="checkbox"/> 4	<input type="checkbox"/> 4
Citizen of Another State	<input type="checkbox"/> 2	<input type="checkbox"/> 2	Incorporated and Principal Place of Business In Another State	<input type="checkbox"/> 5	<input type="checkbox"/> 5
Citizen or Subject of a Foreign Country	<input type="checkbox"/> 3	<input type="checkbox"/> 3	Foreign Nation	<input type="checkbox"/> 6	<input type="checkbox"/> 6

## IV. NATURE OF SUIT (Place an "X" in One Box Only)

CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES
<input type="checkbox"/> 110 Insurance	<b>PERSONAL INJURY</b>	<b>PERSONAL INJURY</b>	<input type="checkbox"/> 422 Appeal 28 USC 158	<input type="checkbox"/> 400 State Reapportionment
<input type="checkbox"/> 120 Marine	<input type="checkbox"/> 310 Airplane	<input type="checkbox"/> 362 Personal Injury - Med. Malpractice	<input type="checkbox"/> 423 Withdrawal 28 USC 157	<input type="checkbox"/> 410 Antitrust
<input type="checkbox"/> 130 Miller Act	<input type="checkbox"/> 315 Airplane Product Liability	<input type="checkbox"/> 365 Personal Injury - Product Liability		<input type="checkbox"/> 430 Banks and Banking
<input type="checkbox"/> 140 Negotiable Instrument	<input type="checkbox"/> 320 Assault, Libel & Slander	<input type="checkbox"/> 368 Asbestos Personal Injury Product Liability		<input type="checkbox"/> 450 Commerce
<input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment	<input type="checkbox"/> 330 Federal Employers' Liability			<input type="checkbox"/> 460 Deportation
<input type="checkbox"/> 151 Medicare Act	<input type="checkbox"/> 340 Marine			<input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations
<input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excl. Veterans)	<input type="checkbox"/> 345 Marine Product Liability			<input type="checkbox"/> 480 Consumer Credit
<input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits	<input type="checkbox"/> 350 Motor Vehicle			<input type="checkbox"/> 490 Cable/Sat TV
<input type="checkbox"/> 160 Stockholders' Suits	<input type="checkbox"/> 355 Motor Vehicle Product Liability			<input type="checkbox"/> 810 Selective Service
<input type="checkbox"/> 190 Other Contract	<input type="checkbox"/> 360 Other Personal Injury			<input type="checkbox"/> 850 Securities/Commodities/ Exchange
<input type="checkbox"/> 195 Contract Product Liability				<input type="checkbox"/> 875 Customer Challenge 12 USC 3410
<input type="checkbox"/> 196 Franchise				<input type="checkbox"/> 890 Other Statutory Actions
REAL PROPERTY	CIVIL RIGHTS	PRISONER PETITIONS	PROPERTY RIGHTS	
<input type="checkbox"/> 210 Land Condemnation	<input type="checkbox"/> 441 Voting	<input type="checkbox"/> 510 Motions to Vacate Sentence	<input type="checkbox"/> 820 Copyrights	<input type="checkbox"/> 891 Agricultural Acts
<input type="checkbox"/> 220 Foreclosure	<input type="checkbox"/> 442 Employment	<b>Habeas Corpus:</b>	<input type="checkbox"/> 830 Patent	<input type="checkbox"/> 892 Economic Stabilization Act
<input type="checkbox"/> 230 Rent Lease & Ejectment	<input type="checkbox"/> 443 Housing/ Accommodations	<input type="checkbox"/> 530 General	<input type="checkbox"/> 840 Trademark	<input type="checkbox"/> 893 Environmental Matters
<input type="checkbox"/> 240 Torts to Land	<input type="checkbox"/> 444 Welfare	<input type="checkbox"/> 535 Death Penalty		<input type="checkbox"/> 894 Energy Allocation Act
<input type="checkbox"/> 245 Torts Product Liability	<input type="checkbox"/> 445 Amer. w/Disabilities - Employment	<input type="checkbox"/> 540 Mandamus & Other		<input type="checkbox"/> 895 Freedom of Information Act
<input type="checkbox"/> 290 All Other Real Property	<input type="checkbox"/> 446 Amer. w/Disabilities - Other	<input type="checkbox"/> 550 Civil Rights		<input type="checkbox"/> 900 Appeal of Fee Determination Under Equal Access to Justice
	<input type="checkbox"/> 440 Other Civil Rights	<input type="checkbox"/> 555 Prison Condition		<input type="checkbox"/> 950 Constitutionality of State Statutes
			LABOR	SOCIAL SECURITY
			<input type="checkbox"/> 710 Fair Labor Standards Act	<input type="checkbox"/> 861 HIA (1395ff)
			<input type="checkbox"/> 720 Labor/Mgmt. Relations	<input type="checkbox"/> 862 Black Lung (923)
			<input type="checkbox"/> 730 Labor/Mgmt. Reporting & Disclosure Act	<input type="checkbox"/> 863 DIWC/DIWW (405(g))
			<input type="checkbox"/> 740 Railway Labor Act	<input type="checkbox"/> 864 SSID Title XVI
			<input type="checkbox"/> 790 Other Labor Litigation	<input type="checkbox"/> 865 RSI (405(g))
			<input type="checkbox"/> 791 Empl. Ret. Inc. Security Act	
				FEDERAL TAX SUITS
				<input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant)
				<input type="checkbox"/> 871 IRS—Third Party 26 USC 7609

## V. ORIGIN

(Place an "X" in One Box Only)

 1 Original Proceeding 2 Removed from State Court 3 Remanded from Appellate Court 4 Reinstated or Reopened 5 Transferred from another district (specify) 6 Multidistrict Litigation 7 Appeal to District Judge from Magistrate Judgment

## VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity)

28 USC 2254, state prisoner habeas corpus petition

Brief description of cause:

## VII. REQUESTED IN COMPLAINT:

 CHECK IF THIS IS A CLASS ACTION  
UNDER F.R.C.P. 23

## DEMANDS

CHECK YES only if demanded in complaint:

JURY DEMAND:  Yes  No

## VIII. RELATED CASE(S) IF ANY

(See instructions):

JUDGE

DOCKET NUMBER

DATE

6/16/05

SIGNATURE OF ATTORNEY OF RECORD

Donald Harwood, Esq. 880#225110

FOR OFFICE USE ONLY

RECEIPT #

AMOUNT

APPLYING IFP

JUDGE

MAG. JUDGE